

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



ORIGINAL  
WITH PROOF  
OF SERVICE

75-7038

Consolidated with 75-7055 & 75-7057

To be argued by  
LEONARD M. MARKS

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

HOWARD BERSCH,

Plaintiff,

-against-

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE  
ROTHSCHILD, HILL SAMUEL AND CO., LIMITED, GUINNESS MAHON  
& CO., LIMITED, PIERSON, HELDRING & PIERSON, SMITH, BARNEY  
& CO. INCORPORATED, J. H. CRANG AND CO., INVESTORS OVER-  
SEAS BANK LIMITED,

Defendants,

ARTHUR ANDERSEN & CO., I.O.S., LTD., and BERNARD CORNFELD,  
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT BERNARD CORNFELD

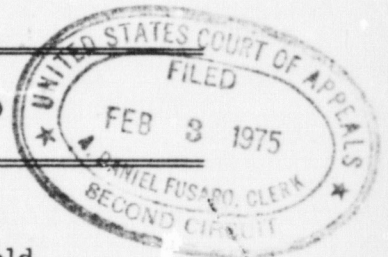
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## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| Statement Of Issues Presented . . . . .   | 1           |
| Statement Of The Case . . . . .   | 2           |
| Pending Swiss Proceedings . . . . .   | 6           |
| Prior Proceedings In The<br>Present Case . . . . .  | 10          |
| Point I - There is No Subject<br>Matter Jurisdiction Over<br>The Claims Asserted . . . . .                  | 13          |
| Point II - Class Action<br>Procedures May Not Be<br>Used To Expand Subject<br>Matter Jurisdiction . . . . . | 21          |
| Conclusion . . . . .  | 29          |

# Table of Authorities

|   | <u>Page</u> |
|---|-------------|
| <u>Adise v. Mather</u> , 56 F.R.D. 492 (D. Col. 1972)   | 28          |
| <u>Barnett v. Anaconda Company</u> , 238 F. Supp. 766 (S.D.N.Y. 1965)   | 20          |
| <u>Brennan v. Midwestern United Life Ins. Co.</u> , 450 F.2d 999 (7th Cir. 1971)<br><u>cert. denied</u> , 405 U.S. 921 (1972)           | 26          |
| <u>Carlisle v. LTV Electrosystems, Inc.</u> , 54 F.R.D. 237 (N.D. Texas 1972)   | 27          |
| <u>Cohen v. Franchard Corp.</u> , 478 F.2d 115 (2d Cir. 1973), <u>cert. denied</u> , 414 U.S. 857 (1973)                                | 20          |
| <u>Eisen v. Carlisle and Jacquelin</u> , 479 F.2d 1005 (2d Cir. 1973), <u>vacated and remanded</u> , ___ U.S. ___, 94 S.Ct. 2140 (1974) | 26          |
| <u>Harris v. Jones</u> , 41 F.R.D. 70 (C.D. Utah 1966)  | 26          |
| <u>Ingenito v. Bermec Corp.</u> , CCH Securities Law Reporter, ¶94,548 (S.D.N.Y. 1974)  | 28          |
| <u>Inmates of Milwaukee County Jail v. Petersen</u> , 51 F.R.D. 540 (E.D. Wis. 1971)  | 24,25       |
| <u>In Re U.S. Financial Securities Litigation</u> , 64 F.R.D. 443 (S.D. Cal. 1974)  | 28          |
| <u>Janigan v. Taylor</u> , 344 F.2d 781 (1st Cir. 1965) <u>cert. denied</u> , 382 U.S. 879 (1965)                                       | 20          |
| <u>Leasco Data Processing Equip. Corp. v. Maxwell</u> , 468 F.2d 1326 (2d Cir. 1972)  | 17,20       |

|  | <u>Page</u> |
|--|-------------|
| <u>List v. Fashion Park, Inc.</u> , 340 F.2d 457<br>(2d Cir. 1965), <u>cert. denied</u> , 382<br>U.S. 811 (1965)                                 | 20          |
| <u>Messenger v. United States</u> , 231 F.2d<br>328 (2d Cir. 1956)   | 11          |
| <u>Pearson v. Ecological Science Corp.</u> ,<br>17 F. R. Serv. 2d 1167 (S.D. Fla.<br>1973)   | 26, 28      |
| <u>Philadelphia Elec. Co. v. Anaconda<br/>American Brass Co.</u> , 43 F.R.D. 452<br>(E.D. Pa. 1968)  | 24          |
| and CCH Trade Cases 172,359 (E.D.<br>Pa. 1968)   | 26, 27      |
| <u>Rogen v. Ilikon Corporation</u> , 361 F.2d<br>260 (1st Cir. 1966)   | 20          |
| <u>Shane v. Northwest Industries, Inc.</u> ,<br>49 F.R.D. 46 (N.D. Ill. 1970)  | 24          |
| <u>Siegel v. Realty Equities Corp. of<br/>New York</u> , 70 Civ. 4338 (S.D.N.Y.<br>1972)   | 26          |
| <u>Simon v. Merrill, Lynch, Pierce,<br/>Fenner &amp; Smith</u> , 482 F.2d 880<br>(5th Cir. 1973)   | 27          |
| <u>Skydell v. Mates</u> , CCH Securities Law<br>Reporter ¶ 93,538 (S.D.N.Y. 1972)  | 27          |
| <u>Smith v. Bear</u> , 237 F.2d 79 (2d Cir.<br>1956)   | 20          |
| <u>Snyder v. Harris</u> , 394 U.S. 332 (1969)  | 21          |
| <u>Supreme Tribe of Ben-Hur v. Cauble</u> ,<br>255 U.S. 356 (1921)   | 24          |
| <u>Taub v. Hale</u> , 355 F.2d 201 (2d Cir.<br>1966), <u>cert. denied</u> , 384 U.S. 1007<br>(1966), <u>reh. denied</u> , 385 U.S. 924<br>(1966) | 11          |

|   | <u>Page</u> |
|---|-------------|
| <u>United States v. First National City</u><br><u>Bank, 396 F.2d 897 (2d Cir. 1968)</u> | 26          |
| <u>Zahn v. International Paper Company,</u><br><u>414 U.S. 291 (1973)</u>               | 21          |
| <br>  |             |
| Advisory Committee's Notes, 39 F.R.D.   |             |
| 103   | 27          |
| 105,106   | 24          |
| <br>  |             |
| Restatement (Second), Conflict of<br>Laws   |             |
| §148  | 17,26       |
| §148(1)   | 17          |
| §148(2)   | 17,18       |
| §188  | 26          |

STATEMENT OF ISSUES PRESENTED

This appeal raises two fundamental issues:

1. Do the American securities laws apply, and does the district court have subject matter jurisdiction over foreign offerings of the stock of a foreign corporation which is not traded in the United States, where 99.6% of the purchasers were foreigners who purchased their stock abroad and where all purchasers were specifically advised that American securities laws would not apply?

2. May plaintiff, a single American purchaser in such offerings, utilize class action procedures to expand subject matter jurisdiction to include approximately 100,000 purchasers resident throughout the world who would otherwise be unable to maintain actions in the United States under the securities laws?

### STATEMENT OF THE CASE

This is an appeal by defendant Bernard Cornfeld ("Cornfeld") from an order by Judge Robert L. Carter of the United States District Court for the Southern District of New York, filed and entered November 27, 1974, which denied that portion of Cornfeld's motion pursuant to Rule 12(b), Fed. R. Civ. P., which sought an order dismissing the complaint for lack of subject matter jurisdiction.\* The district

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\* The motion sought the following relief:

1. Pursuant to Rules 12(b) and 41(b), Fed. R. Civ. P., for an order dismissing the complaint (a) for lack of personal jurisdiction over defendant Cornfeld, (b) for failure to prosecute the action against Cornfeld for more than seventeen months, and (c) for lack of subject matter jurisdiction or upon the ground of forum non conveniens, or alternatively,

2. Pursuant to Rule 23(c)(1), Fed. R. Civ. P., for an order amending the conditional class action determination of Hon. Marvin L. Frankel of June 28, 1972, to provide:

(a) that this suit may not be maintained as a class action; or,

(b) that foreign nationals who purchased I.O.S. Ltd. ("IOS") stock outside the United States be excluded from the purported class and the class be limited to either (i) United States residents who purchased IOS stock or (ii) United States citizens wherever resident who purchased IOS stock.

court certified the question of subject matter jurisdiction pursuant to 28 U.S.C. §1292(b). Leave to appeal was granted by this Court on January 7, 1975, and this appeal was consolidated with the appeals of defendants Arthur Andersen & Company ("Andersen") and IOS Ltd. ("IOS").

On December 4, 1974, Judge Carter entered an order which directed that the first notice of any kind be given to the class\* and approved a form of notice stating that this action may be maintained as a class action by plaintiff as the representative of all persons who purchased the common stock of IOS in three public offerings in September 1969. It advises class members that they will be bound by any judgment in this action unless they specifically request exclusion from the class.\*\* (287A et seq.) The mailing of this

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\* The notice was approved in connection with a partial settlement of the action reached by defendants Banque Rothschild, Guinness Mahon & Co., Limited, Lexerd & Co., Inc., Pierson, Heldring & Pierson, and Smith, Barney & Co., Incorporated, with plaintiff. [283A]

\*\* The complaint alleges that the class consists of 100,000 purchasers. (Complaint ¶2(a)(ii)(6A)) Discovery has demonstrated that only 387 Americans purchased IOS stock on these offerings and that all but 37 of the Americans were resident abroad when they made their purchases. (192A26)

notice has been stayed by order of this court dated January 7, 1975 until the argument of this appeal.

This appeal presents important questions involving the applicability of the American securities laws, and the jurisdiction of the district court over extraterritorial transactions. The basic issue is whether the securities laws of the United States may be invoked, and class action procedures utilized, on behalf of approximately 99,600 foreign purchasers of IOS stock in three 1969 public offerings. IOS was a foreign corporation, chartered in Canada and headquartered in Switzerland, whose stock was never listed or traded in the United States. (192A-12, 169A-170A) The typical prospective class member is a European citizen who purchased IOS stock in his native country through a European bank, broker or underwriter. (192A-19) Purchasers received prospectuses printed in their native languages. They were published in French, German, Spanish, Italian and English. (Id.) All prospectuses stated clearly on their covers, in effect, that the American securities laws were inapplicable and would not afford any protection to purchasers. (192A-22, 168A, 184A). It was emphasized that

the activities of IOS were governed by foreign law. (See, e.g., Drexel Prospectus, pp.27-28, IOB Prospectus, pp. 27-28)

The underwriters made extensive and successful efforts to avoid sales to Americans. 99.6% of the estimated 100,000 stock purchasers were foreign nationals who purchased their stock outside the United States. (192A-20, 229A-232A) Only 367 purchasers were Americans, the vast majority of whom resided in Europe and worked for IOS. Only 37 purchasers were residents of the United States. (Exhibits J and K to the Affidavit of Leonard M. Marks, sworn to February 14, 1974, contain the names and residences of all the American purchasers) The only Americans, wherever resident, who were permitted to buy IOS shares were those who had enjoyed an association with the company. They purchased only through one of the three offerings, the Investors Overseas Bank Ltd. ("IOB") underwriting. They represented only a minuscule percentage of the purchasers in the 3,942,000 share IOB offering. (192A-26) No Americans purchased any shares in either the 1,450,000 share J.H. Crang & Co. offering or the 5,600,000 share Drexel Harriman Ripley Inc. offering. (256A) Plaintiff, Bersch, an American resident who worked

for an IOS director and selling shareholder, purchased 600 shares of IOS stock for \$6,000 through IOB. (5A, 192A-18-19,26)

The brief submitted on behalf of defendant Andersen sets forth a complete statement of the background facts, incorporated here by reference, regarding the three offerings in question and the strenuous efforts to minimize American contacts and sales to Americans.

#### PENDING SWISS PROCEEDINGS

In November 1971, before any complaint was filed in the district court (and a year and a half before any attempt was made by plaintiff to serve Cornfeld), Swiss proceedings were initiated and subsequently joined by 395 IOS stock purchaser-complainants of 22 nationalities, including at least 18 Americans (192A-15-17,18) The Swiss complaint, filed at the headquarters of IOS in Geneva, charges that the plaintiffs were defrauded by Cornfeld and 29 other IOS directors and selling shareholders in the IOS offerings. (192A-34 through 49) The plaintiffs claim that they were deceived by the same allegedly false prospectuses and financial statements and omissions now relied upon

by the plaintiff in this action. Both civil reparations and criminal sanctions are sought in the Swiss proceeding, which are being actively investigated against Cornfeld. Simplified arrangements have been made in Switzerland for the filing of form complaints by IOS stock purchasers. (192A-15) Aggressive Swiss counsel has been retained, who has already received 1 Swiss franc per share purchased by his clients and a 50,000 Swiss franc fee on the settlement of 90 claims. (298A)

Prior to the filing of the Swiss action, a circular dated October 18, 1971, and form complaint ready for signature were widely distributed on behalf of a European committee formed to represent purchasers of IOS stock. A copy is reproduced at pp. 192A-28 through 49 of the appendix. Swiss law permits intervention by civil parties in criminal proceedings. The Swiss judgment being sought against Cornfeld would include complete damages or reparations for the purchase of IOS stock. (192A-16-17) In contrast to the hundreds of purchasers of 22 nationalities who have joined in the Swiss proceedings, not a single person has sought to join in the subsequent action filed by Bersch in the three years it has been

pending. The real parties in interest have thus demonstrated where jurisdiction should lie.\*

Although Swiss law does not permit class actions per se, the procedures adopted by Swiss counsel, including the simplified filing of form complaints, making arrangements for the compensation of counsel based on the number of shares of IOS stock purchased, and representation of hundreds of complainants by one attorney bear a striking resemblance to aspects of class actions and demonstrate the availability of an adequate forum for all plaintiffs. (192A-17) Claimants

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\* Of the 395 claims that have been processed in the Swiss judicial proceedings against Cornfeld (all of whom are members of the class plaintiff seeks to represent), 194 are claims of Swiss employees of IOS working in Switzerland or France; 89 are claims of non-Swiss IOS employees who purchased stock in the public offering while working for IOS in Switzerland; and 112 are claims of non-Swiss employee-purchasers of IOS stock employed by IOS in France. The claimants are of the following nationalities: American, German, Canadian, Australian, Italian, Indian, French, English, Turkish, Spanish, Portuguese, Greek, Chilean, Armenian, Sudanese, Danish, South African, Argentinian, Israeli, Dutch, Algerian and Austrian. (192A-17)

in the Swiss action are required to affirmatively "opt-in" by filing individual form complaints, thus assuring a res judicata determination of their claims in Switzerland (See, e.g., 192A-19-20)

All of the numerous claims filed in Switzerland are made on behalf of purchasers who bought IOS stock in only one of the three public offerings - - that made through Investors Overseas Bank Ltd. - - an IOS subsidiary which sold to IOS sales representatives, employees, clients and others with a longstanding relationship with IOS. (192A-17) The plaintiff in the present action, Howard Bersch, purchased his shares through the same Investors Overseas Bank Ltd. offering as the hundreds of complainants in the Swiss proceedings. Bersch did not purchase in either of the other two offerings of Drexel and Crang, although he now seeks to represent everyone who did, who are all foreigners.

Ninety European purchasers of IOS stock have settled their claims and received payment after their testimony was taken by the presiding Swiss official. (297A) Negotiations concerning settlement of approximately 200 other claims are pending. (Id.)

PRIOR PROCEEDINGS IN THE PRESENT CASE

Instead of joining in the pending Swiss proceedings being prosecuted by the Swiss government, Bersch filed the present lawsuit in December 1971. (192A-6)

Although he purports to represent 100,000 purchasers who allegedly relied, inter alia, upon the September 24, 1969 prospectuses, Bersch made his \$6,000 purchase of 600 shares on September 3, 1969, three weeks before such reliance was even possible. (192A-24-25) In addition, the complaint alleges that Bersch and the other IOS purchasers were defrauded in relying upon other representations, amounting to touting and market priming, emanating from press conferences, speeches and television appearances by Cornfeld and others. (Complaint ¶¶10(e), 16, 17, 18(b), 13A, 16A-17A)

After filing his complaint in 1971, Bersch promptly served and actively litigated against most of the defendants. (192A-8) He made no effort, however, to serve Cornfeld. Then on May 15, 1973, the day following Mr. Cornfeld's widely publicized arrest in Switzerland, plaintiff had a summons and complaint left in California at a house

previously used by Mr. Cornfeld. (192A-8)\*

Plaintiff has never offered any excuse or justification for his extraordinary 17 month delay in prosecuting this action against Mr. Cornfeld.\*\*

Plaintiff's failure to serve Cornfeld was highly prejudicial. In addition to Cornfeld's inability to participate in seven depositions and the production of thousands of pages of documents, all concerning subject matter jurisdiction, Judge Frankel rendered an interim class action determination in Cornfeld's absence. (192A-6,7) The de-

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\* Knowing Cornfeld was incarcerated in Switzerland and being held virtually incommunicado, plaintiff then entered a default against Cornfeld. The default was opened by Judge Ryan on December 5, 1973. (192A-7) Concerned about the invalidity of his May 1973 service, plaintiff served Cornfeld by mail to St. Antoine's Prison in Geneva in February 1974. (278A)

\*\* Although plaintiff's counsel acknowledged that he could have proceeded against Cornfeld long before, but chose not to (191A), and Judge Carter found plaintiff guilty of "neglect" in failing to serve Cornfeld, the Court denied Cornfeld's motion to dismiss for lack of prosecution. (279A, 280A) A motion seeking reargument or certification of this issue is pending in the district court. See Messenger v. United States, 231 F.2d 328 (2d Cir. 1956); Taub v. Hale, 355 F.2d 201 (2d Cir. 1966), cert. denied, 384 U.S. 1007 (1966), reh. denied, 385 U.S. 924 (1966).

tailed facts regarding the Swiss proceedings described above were therefore not known to Judge Frankel, and since Cornfeld was not a party to the action until approximately 11 months later, he never had an opportunity to appeal the class action determination.

POINT I

THERE IS NO SUBJECT MATTER  
JURISDICTION OVER THE CLAIMS  
ASSERTED

The briefs of Andersen and IOS fully discuss the inapplicability of the United States securities laws to the three offshore offerings. We join in their arguments, and will not burden the Court with a repetition of their discussion and citations. Our focus will be on the 99.6% of the 100,000 member "class" who are non-resident foreign nationals.

The facts concerning Bersch and his individual claim are so atypical of the class he seeks to represent that they tend to distort analysis of subject matter jurisdiction as it affects the class members. Unlike virtually the entire class, Bersch (a) is an American, (b) was closely associated with the affairs of IOS, (c) worked directly for an IOS director and major selling shareholder, (d) resided in the United States at the time of his purchase, and (e) did not rely on any purported misrepresentations in the prospectuses because he paid for his shares three weeks before the prospectuses were issued. (192A-24-25)

In contrast, the claim of a typical class member is much different. For purposes of analysis, let us consider a typical German

purchaser, although we might just as well have chosen one from any of numerous other countries, since 99.6% of the purchasers are foreigners.

IOS was well-known in Germany at the time of the offerings, as it was throughout the world. A typical German purchaser was thus familiar with the company and may have previously invested in one of its mutual funds, or purchased IOS insurance. The prospectus he reviewed was sent to him in Germany, and printed in German. Its cover advised him that purchasers would not be protected by American securities laws. (168A)

A German purchaser reading the prospectus was advised of the following material facts:

- (a) IOS was a Canadian corporation, headquartered in Geneva.
- (b) The underwritings were being conducted outside the United States.
- (c) IOS shares were not traded in the United States and would be traded on the Luxembourg, Amsterdam, Montreal and Toronto stock exchanges.
- (d) IOS was barred from selling its securities in the United States.
- (e) Dividend notices would be published in nine newspapers, none of which was American.

(f) Transfer agents and registrars for IOS stock were banks located in Canada and Great Britain.

(g) Shares in mutual funds managed by IOS were not sold in the United States.

(h) IOS mutual funds, banks, insurance companies and all other subsidiaries were incorporated outside the United States.

(i) The sale of IOS mutual fund shares were not subject to U. S. regulation.

(j) All but two of the thirty IOS directors resided outside the United States.

(Drexel Prospectus, pp. 5, 13, 16-22, 28, 31-32; 168A-172A, 174A, 192A-109)

If he was not already familiar with IOS, he also learned from the prospectus that IOS was engaged in a wide variety of substantial business activities in his own country:

(a) Over one-third of the extensive European sales of mutual funds under the IOS Investment Program were made in West Germany.

(b) Investors Fond, one of many IOS subsidiaries, was an open-end mutual fund organized in 1968 in Germany, which had total net assets of almost \$30,000,000

and primarily invested in the German economy.

(c) IOS owned a 90% interest in Orbis Bank whose principal office was in Munich, with branch offices in Cologne, Dusseldorf, Frankfurt and Hamburg. The bank was a member of the Munich Stock Exchange.

(d) IOS engaged in the public underwriting and private placement of Euro-dollar securities issues.

(e) IOS marketed life insurance written by a large German insurance company.

(f) All IOS-managed mutual funds were subject to regulation by the German government.

(g) IOS subsidiaries maintained offices in six German cities.

(Drexel Prospectus, pp. 13, 21-23, 26-27, 34)

Armed with all of this information, the German purchaser directed his local broker or bank to purchase IOS shares for him through one of the ten German underwriters and banks who participated. (175A) The German purchaser paid for his purchase in Deutschmarks, and the shares were delivered to him through the German mails.

Unquestionably, he would have had no expectation that the United States securities laws would apply in any way to his purchase.

As any German purchaser would have expected, protection is available under German law. In fact, three causes of action exist under German law for the conduct alleged in Bersch's complaint: civil damages for criminal fraud, intentional infliction of damage and breach of contract. (168A-17 et seq.) Consistent with such expectations, American choice of law rules support the view that German law exclusively governs this transaction -- not American securities laws as Judge Carter ruled. See Section 148, Restatement (Second), Conflict of Laws (1971), referred to in Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 at 1337 (2d Cir. 1972).

Section 148(1) of the Restatement provides that where the allegedly false representations were made, received, and relied on in a single jurisdiction, that jurisdiction's law determines the rights and liabilities of the parties.

Section 148(2) of the Restatement provides that where a plaintiff's acts in reliance upon representations took place in whole or in part in a jurisdiction other than that in which the allegedly false representations were made,

the law to be applied is that of the jurisdiction with the most significant relationship to the occurrence and the parties. The following factors are to be considered:

"(a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations" - in this case, Germany;

"(b) the place where the plaintiff received the representations" - again, Germany;

"(c) the place where the defendant made the representations" - Germany;

"(d) the domicile, residence, nationality, place of incorporation and place of business of the parties" - German domicile, residence and nationality of plaintiff; Canadian incorporation of IOS, IOS place of business in Switzerland and Germany; place of business of underwriter, bank or broker - Germany;

"(e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time" - IOS was a Canadian corporation, headquartered in Switzerland, stock sent to Germany; and

"(f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant" - Germany.

All of these places are outside the United States in the case of the typical foreign purchaser.

No German purchaser has asserted claims in the United States courts. Bersch is the only purchaser who has filed suit in this nation. Many

claimants have asserted their claims in Switzerland in the well-publicized suit by hundreds of IOS purchasers pending against Cornfeld.(297A)

With the possible exception of 387 American purchasers, our German purchaser, not Bersch, typifies the 100,000 purchasers of IOS stock abroad.

Analyzing the facts in terms of the traditional elements of the asserted 10b-5 claim, the same result obtains for foreign purchasers. The alleged misrepresentations, their materiality, Cornfeld's scienter,\* each purchaser's reliance,

\* Lack of subject matter jurisdiction is particularly clear with regard to the activities of Cornfeld, who lived and worked in Geneva throughout the period alleged in the complaint. Cornfeld had little or nothing to do with the prospectuses concerning the offerings of IOS stock. He never met with the accountants or lawyers who prepared the prospectuses; he did not participate in their preparation or dissemination, and did not participate in any arrangements with the underwriters, with the exception of one meeting in Geneva which convinced the underwriters to reevaluate the proposed offering price. (192A-12-13)

The seven depositions conducted by plaintiff contain virtually no references to any activities of any kind by Cornfeld. There are no references to his having done anything in the United States with regard to the offerings of IOS stock. Indeed, the depositions confirm that Cornfeld's contact with those preparing the offerings was minimal, and occurred entirely in Switzerland.

and his damage all took place outside the United States. Lis v. Fashion Park, Inc., 340 F.2d 457 (2d Cir. 1965) cert. denied, 382 U.S. 811 (1965); Rogen v. Ilikon Corporation, 361 F.2d 260 (1st Cir. 1966); Cohen v. Franchard Corp., 478 F.2d 115 (2d Cir. 1973), cert. denied, 414 U.S. 857 (1973); Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965), cert. denied, 382 U.S. 879 (1965); Smith v. Bear, 237 F.2d 79 (2d Cir. 1956); Barnett v. Anaconda Company, 233 F. Supp. 766 (S.D.N.Y. 1965).

Accordingly, any analysis of the operative facts, based upon choice of law rules, the knowledge and expectations of the parties, or the elements of a claim under Rule 10b-5, leads to the conclusion that the District Court does not have subject matter jurisdiction over this action.

## POINT II

### CLASS ACTION PROCEDURES MAY NOT BE USED TO EXPAND SUBJECT MATTER JURISDICTION

Plaintiff will argue that he, an American who resides here, is entitled to the protections of the American securities laws, and to represent other purchasers. In our view, for the reasons set forth above, American law does not extend to any IOS purchaser. Even if the Court were to rule otherwise as to Bersch, however, no independent basis for subject matter jurisdiction exists for foreign claimants. The invocation of class action procedures by Bersch does not create such jurisdiction. It is well settled that Rule 23 does not expand the jurisdictional limits of the federal courts. Each member of a class must demonstrate that his claim meets jurisdictional requirements, and could have been brought independently in the same federal court. A person possessing a claim which lacks subject matter jurisdiction cannot ride another's coattails into the federal courts. Zahn v. International Paper Company, 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969).

In accepting subject matter jurisdiction over these numerous foreign claims through the class action device, the district court has

extended the law far beyond any past decisions. In Leasco, supra, the court inquired whether subject matter jurisdiction would exist "where a German and a Japanese businessman met in New York for convenience, and the latter fraudulently induced the former to make purchases of Japanese securities on the Tokyo Stock Exchange." 468 F.2d at 1338. The court's decision made clear that United States securities laws would not extend to this situation. The present case offers an even weaker basis for extending subject matter jurisdiction. Here, the foreign purchasers did not even have that miniscule contact with the United States.

The error of the District Court's approach is evident from an analysis of the hopelessly complex problems which have been created. The class action is a procedure which is unknown to the jurisdictions in which the 99,600 foreign purchasers reside. Affidavits of foreign lawyers submitted below demonstrate that under the laws of Germany, Switzerland (where proceedings against Cornfeld are being actively litigated), England, France, and Italy, a decision of an American court in this purported class action would not be binding abroad unless class members, at the outset, affirmatively join in the lawsuit and expressly agree to be bound by the American determination.

(125A, et seq., 145A, et seq., 161A-1, et seq., 161A-17, et seq., 161A-28, et seq.) Since the District Court has refused to require that the class notice require members to "opt-in" in order to participate in this action, a judgment in this action will not have any res judicata effect abroad.\* As a practical matter, foreign purchasers have no control or realistic opportunity to participate in this suit approximately 4,000 miles from their homes. They will be given notice of various aspects of the proceedings in only the English language, despite the fact that many of them (and their lawyers) do not understand English, and received prospectuses printed in their native languages.\*\*

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\* This issue troubled Judge Frankel who noted:

"[I]f defendants prevail against a class, they are entitled to a victory no less broad than a defeat would have been. The attempt to achieve that kind of reciprocal treatment should be manageable in the course of this action. It may require, in the court's discretion, that putative members be required to 'opt-in' or to face exclusion from the class for all purposes." (83A)

\*\* Judge Carter, over objections by Cornfeld, IOS and Andersen, directed that the notice be sent and published only in English and refused to provide a notice to the class members in the languages in which the prospectuses they received were printed.

It abuses any concept of practicality, fairness and judicial administration to literally drag 100,000 foreign purchasers into District Court proceedings, and to force defendants to defend these claims here without obtaining res judicata effect abroad. It is particularly unfair to Cornfeld who is already defending hundreds of the same claims, by the very same class members, in the Swiss courts.

Such one-way intervention, where class members will be able to collect if they win, and yet relitigate the issues elsewhere if they lose, is not permitted by Rule 23. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-7 (1921); Advisory Committee's Notes, 39 F.R.D. at 105-106.

The warning of Judge Fullam in Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 459 (E.D. Pa. 1968), is particularly appropriate:

"[C]ourts should eschew applications of Rule 23 so expansive in scope as to permit a return to one-way intervention under a new guise. The difference between 'I will intervene if our side has already won' and 'If I find out our side has lost I will collaterally attack the judgment on due process grounds' may not be very great."

See also Shane v. Northwest Industries, Inc., 49 F.R.D. 46, 47 (N.D. Ill. 1970), and Inmates of

Milwaukee County Jail v. Petersen, 51 F.R.D. 540,  
542 (E.D. Wis. 1971)

Most significantly, this is not a case where foreign citizens have attempted to invoke or expand American subject matter jurisdiction because of their lack of an adequate forum. Not a single foreign purchaser has sued in the United States or joined in this action. Instead, hundreds of IOS purchasers of 22 nationalities have paid Swiss counsel to file and actively pursue their claims in Switzerland, the natural site for this litigation.

Plaintiff's purported class action would also be totally unmanageable. It is estimated that plaintiff's class would encompass citizens of as many as one hundred countries, speaking at least twenty-five languages. (192A-21) Locating and notifying purchasers of IOS stock five years ago who are scattered around the globe would pose insurmountable problems. If meaningful procedures were to be adopted, interpreters would have to be retained to prepare the various notices, and to assist in responding to inquiries from claimants unfamiliar with American court procedures.

Even more difficult language hurdles would have to be faced in evaluating proofs of claim which class members would be required

to submit. See, e.g., Siegel v. Realty Equities Corp. of New York, 70 Civ. 4338 (S.D.N.Y. 1972); Harris v. Jones, 41 F.R.D. 70(C.D. Utah 1966). And the difficulties in preparing written interrogatories and evaluating the answers of thousands of class members would be insurmountable. (See, Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972)).

Equally burdensome would be the difficulties of litigating under foreign laws, embodying a wide range of social policies. Choice of law rules would require that such diverse foreign laws be applied to claims of foreign nationals. Restatement, (Second), Conflicts of Laws §§ 148, 188. Similarly, full use of discovery procedures afforded by the Federal Rules would be substantially hindered by the world-wide scope of this case, and by the secrecy laws governing foreign banks. (United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968)).

The entire undertaking would be prohibitive. Pearson v. Ecological Science Corp., 17 F.R. Serv.2d 1167 (S.D. Fla. 1973). See also Eisen v. Carlisle and Jacquelin, 479 F.2d 1005 (2d Cir. 1973), vacated and remanded, \_\_\_ U.S. \_\_\_, 94 S.Ct. 2140 (1974); Philadelphia Electric Co. v. Anaconda

American Brass Co., CCH Trade Cases ¶72,359 (E.D. Pa. 1968).

If subject matter jurisdiction were extended to this foreign action, thousands of separate trials would be required. The complaint goes far beyond the three standardized offering prospectuses and specifically alleges that the purported class was defrauded by statements made at press conferences, speeches and television appearances. (Complaint ¶¶10(e), 16, 17, 18(b), 13A, 16A-17A) Proof of reliance, materiality and causation would have to be received from each individual class member since the alleged false oral and written statements upon which plaintiff claims the class relied were disseminated throughout the world in various forms and were not standardized. The single individual plaintiff, who resided in the United States, is in no position to assert these allegations on behalf of 100,000 different persons. In such cases, class actions are uniformly rejected. Advisory Committee Notes, 39 F.R.D. 103; Simon v. Merrill, Lynch, Pierce, Fenne & Smith, 482 F.2d 880, 882-3 (5th Cir. 1973), and cases cited therein; Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237, 240 (N.D. Texas, 1972); Skydell v. Mates, CCH Securities Law Reporter ¶93,538 (S.D.N.Y. 1972);

Pearson v. Ecological Science Corp., 17 F.R. Serv. 3d 1167 (S.D. Fla. 1973); Ingenito v. Bermec Corp., CCH Securities Law Reporter, ¶94,548 (S.D.N.Y. 1974).

Injecting foreign claims into this case through use of class action procedures will require the application of the laws of innumerable foreign nations. For the reasons indicated in Point I, foreign laws apply to claims by foreign purchasers. The complaint specifically incorporates pendent claims beyond the American securities laws. (Complaint ¶1,5A) Cf., Adise v. Mather, 56 F.R.D. 492, 497 (D. Colorado, 1972); In Re U.S. Financial Securities Litigation, 64 F.R.D. 443, 445 (S.D. Cal. 1974).

The foregoing facts demonstrate that this case should not proceed under any circumstances. At the very least, the pendency and availability of foreign proceedings, the problems of res judicata, notice to foreigners, manageability, the dubious applicability of American law, complex questions of foreign law, and the atypicality of the individual plaintiff, require the exclusion of foreigners and Americans resident abroad from the purported class, on the grounds that subject matter jurisdiction does not pertain to them and class action procedures should not be applied as to them.

CONCLUSION

The order sustaining subject matter jurisdiction should be reversed, and the complaint should be dismissed.

Dated: New York, New York  
February 3, 1975

Respectfully submitted,

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Bernard Cornfeld

Of Counsel:

Martin R. Gold  
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2  
Received 2 copies of the within  
Brief of Appellant Bernard Cornfeld  
this 3 day of Feb, 1975.

Sign Bruce Abbott Morgan  
Bruce Abbott Morgan  
For: \_\_\_\_\_ Esq(s).

Att'ys. for Defendant Appellant  
Arthur Anderson & Co

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Sign K. Bellucci  
Wachtell Lipton Rosen Katz  
For: \_\_\_\_\_ Esq(s).

Att'ys for Defendant Appellant  
IOS Limited

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Received 2 copies of the within  
Brief of Appellant Bernard Cornfeld  
this 3 day of Feb, 1975.

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Silverman & Harnes  
For: \_\_\_\_\_ Esq(s).

Att'ys for Plaintiff

